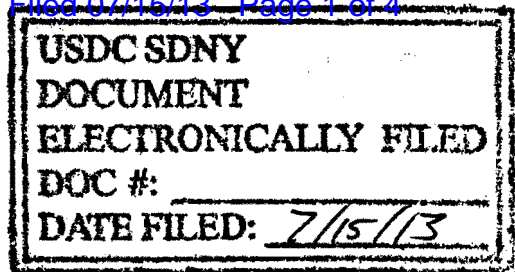


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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REED CONSTRUCTION DATA INC., :

Plaintiff, : 09 Civ. 8578 (JPO) (HBP)

-against- : OPINION

AND ORDER

THE MCGRAW-HILL COMPANIES, INC., :
et al., :

Defendants. :

-----X

PITMAN, United States Magistrate Judge:

I write to resolve a dispute addressed in correspondence from defendant's counsel dated June 17 and 28, 2013 and in correspondence from plaintiff's counsel June 24, 2013. The reader's familiarity with the prior decision of Judge Sweet in this matter dated September 13, 2010 and my prior decision dated April 15, 2013 is assumed.

In my April 10, 2015 Order, I precluded plaintiff from seeking damages with respect to the 26 customers and prospects that plaintiff first identified in February and March 2013 ("the Newly Identified Customers"). The present dispute stems from plaintiff's recent production to defendant of declarations from current or former employees of three of the Newly Identified Customers -- K Ross Company, Ulma Form Works and Siemens. In

general, the three declarations describe sales pitches and subscription offers and counter-offers that defendant made to K Ross Company, Ulma Form Works and Siemens in order to induce them to choose defendant's service over plaintiff's service. Plaintiff does not affirmatively state what it intends to use the declarations for; indeed, plaintiff has not yet offered the declarations as proof of anything. Rather, it appears that plaintiff has produced the declarations to defendant in an effort to preserve its putative right to use the declarations for any purpose other than as proof of damages (see Letter of William N. Withrow, Jr., Esq. dated June 3, 2013, annexed as Exhibit D to the Letter of Saul B. Shapiro, Esq., dated June 17, 2013). Defendant claims that my April 15, 2013 Order precludes plaintiff from using testimony or evidence from any of the Newly Identified Customers for any purpose, and seeks an Order to that effect.


I conclude that the dispute is not yet ripe for resolution. As noted in my earlier decision precluding plaintiffs from seeking damages with respect to any of the Newly Identified Customers, a four-factor analysis is used to determine whether a party's failure to comply with its disclosure obligations warrants preclusion. Those factors are: "(1) the party's explanation for the failure to comply with the disclosure requirement, (2) the importance of the excluded evidence, (3) the prejudice

suffered by the opposing party as a result of having to prepare to meet the new testimony, and (4) the possibility of a continuance." Kam Hing Enterprises, Inc. v. Wal-Mart Stores, Inc., 359 F. App'x 235, 237 (2d Cir. 2010), citing Design Strategy Inc. v. Davis, 469 F.3d 284, 296 (2d Cir. 2006); accord Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC, 571 F.3d 206, 213 (2d Cir. 2009). Without knowing the specific purpose for which evidence is being offered, it is impossible to assess the second and third factors. In addition, if evidence from K Ross Company, Ulma Form Works and Siemens is never offered, there is no need to decide anything.

Accordingly, defendant's application for an Order precluding plaintiff from using evidence from K Ross Company, Ulma Form Works and Siemens for any purpose is denied without prejudice to renewal. This Order does not, of course, modify my April 15, 2013 Order in this matter (Docket Item 141).

Dated: New York, New York
July 15, 2013

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

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